85-2149 (1)

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE WARREN CRAFT and
LOUIS A. DeSALLE III,

Petitioners,

-vs-

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, TRUMAN O. ANDERSON, HOWARD BERS, ELIZABETH McGREW and JACK BULMASH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 app

QUESTIONS PRESENTED

1. Does the right to trial by jury extend to the private cause of action implied under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d?

2. When a medical school secured federal funds for the education of minority students on the representation the funding is necessary lest minority students flunk out at a disproportionate rate, and when, in lieu of the remedial programs it had promised, the school simply permits minority students to "make it on their own,"

Are minority students, who are among the intended beneficiaries of federally funded remedial programs, required to prove discriminatory motive in order to prevail in their private action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d against a school arising out of the school's failure to provide remedial programs it had promised to provide in order to secure federal funding?

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IN THE

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WILLIE WARREN CRAFT and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 28, 1986.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-6a) is not as yet reported. An opinion was not issued by the district court in connection with the final disposition of the case.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals (App. 7a) was entered on March 28, 1986. Rehearing was not sought.

STATUTE INVOLVED

This case involves Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d which provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT

1. *Procedural History*

1. Petitioners commenced this lawsuit in 1979 after they had been unable to receive medical degrees from the University of Illinois. In their complaint, petitioners contended *inter alia* that they had been wrongfully deprived of rights secured by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. (Tr. 1584-86.)

2. Petitioners enrolled in the "Medical Opportunity Program" at the University of Illinois in September, 1972.[1] Petitioners thereafter successfully completed each of the school's graduation requirements with the exception of its "Senior Comprehensive Examination" and were dismissed from the school in 1978 after they had each failed the test on several occasions.[2]

3. At trial, petitioners presented evidence that the school had failed to help them prepare for the test and that it had failed to provide them with the special support it had promised when it secured federal funding for the Medical Opportunities Program.[3]

---

[1] Starting in the early 1970's, the University of Illinois received federal funding for its "Medical Opportunity Program," a plan designed to provide special support to disadvantaged minority students. The school had secured this funding upon its representation that extra support was necessary to insure that the disadvantaged minority students would be able to complete medical school.

[2] The Senior Comprehensive Examination had a disparate impact upon black students. (Tr. 1042.) For example, in March of 1976, the test was passed by 95% of the white students as compared to 41% of the black students. Similarly, in March of 1977, 87% of the whites passed as compared to only 33% of the blacks.

[3] In 1978, the year after petitioners had been expelled, the school for the first time adopted a formal remedial program. (Tr. 666.) In 1979, there was a 9% jump in the number of black students who passed the Senior Comprehensive Examination. (Tr. 1400.)

(Footnote continued on following page)

In final argument, respondents' counsel admitted that the school's position about remedial programs was that "[minority students] don't need special remediation. They don't need any superior treatment to the whites. They can make it on their own." (Tr. 1751.)

At the conclusion of trial, petitioners' Title VI claim was submitted to a jury. The jury interrupted its deliberations to inquire whether a violation of Title VI could have been shown by "negligence of the University of Illinois instead of intentional deprivation." The district judge instructed the jury that negligence was insufficient and that petitioners were required to show knowing or intentional discrimination; shortly thereafter, the jury returned a verdict in favor of defendants, the Board of Trustees of the University of Illinois and several of its employees. The district court denied petitioners' post-trial request for equitable relief without opinion.

4. On appeal, petitioners argued that the jury's verdict on the Title VI claims had not eliminated the district court's obligation to resolve those claims on the basis of express findings of fact and conclusions of law. Petitioners also argued that their Title VI claim did not require proof of knowing or intentional discrimination.

(Footnote continued from preceding page)

Prior to 1978, remedial programs were non-existent (Tr. 486, 493, 579) or consisted of "independent study." (Tr. 508, 594.) For example, petitioner Craft was not assigned an adviser until 1977, after he had failed the Senior Comprehensive Examination for the third time. (Tr. 898.) The adviser, who also was involved in writing the test, refused to help Craft focus on areas to study for the examination because of an "ethical responsibility" to the security of the exam. (Tr. 913.) Instead, the adviser instructed Craft to do independent study and follow the adviser on hospital rounds. (Tr. 1258.) (This adviser was subsequently instrumental in securing Craft's dismissal from the school. (Tr. 915, 919.))

The Seventh Circuit rejected petitioners' arguments and held that the Title VI claim had been properly submitted to the jury. (App. 5a.) The court of appeals also held that intentional discrimination was an essential element of a Title VI claim which is not based on agency regulations. (App. 4a.)

REASONS FOR GRANTING THE WRIT

1. The core of petitioners' Title VI claim is that after they had been accepted into medical school as disadvantaged minority students who required remedial help, the school failed to provide them with the educational assistance it had promised to provide when it secured federal assistance for educating minority students. In the view of the Seventh Circuit, in order to prevail on this Title VI claim, petitioners were required to show that intentional discrimination motivated the school in its refusal to provide the promised remedial programs. The question of whether such intentional wrongdoing is required in this type of Title VI claim is an important issue which has not been resolved by this Court.

The type of Title VI claim asserted in this case is unlike that before the Court in *Guardians* v. *Civil Service Commission*, 463 U.S. 582 (1983), a case which the Seventh Circuit deemed controlling. (App. 4a.) The Title VI claim in *Guardians* arose from the respondent's promise not to discriminate as a condition of receiving federal funds. The breach of a general promise not to discriminate is different from the breach of a specific promise to provide remedial programs.

The Title VI claim asserted in this case is in effect a third party beneficiary claim. In order to secure federal funds, respondents promised the federal government to provide remedial programs. Petitioners were among the intended beneficiaries of that promise and brought this action to seek a remedy for respondents' alleged breach of their promise to the federal government.

The grant of review in this case would provide the Court with an opportunity to clarify the diversity of views expressed in *Guardians*. There, five members of the Court concluded that proof of discriminatory intent is not required in a private Title VI action, 463 U.S. at 584 & n.2, but a majority of the Court could not agree on the theory for this conclusion.

Six members of the Court agreed that the impact/intent issue had been decided in *Lau* v. *Nichols*, 414 U.S. 563 (1974), but four justices were of the opinion that this aspect of *Lau* had been overruled in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). 463 U.S. at 613 (O'Connor, J.); 463 U.S. at 640 (Stevens, Brennan & Blackmun, JJ.). Justice White, 463 U.S. at 590-91, and Justice Marshall, 463 U.S. at 624-25, each of whom had joined in the *Bakke* opinion purportedly overruling *Lau*, did not agree that *Lau* had been overruled.

The five justice majority view in *Guardians* that proof of discriminatory intent is not required in a private Title VI action came from the votes of Justice White and Justice Marshall and the conclusion of Justices Stevens, Brennan, and Blackmun that Title VI reached non-intentional discrimination when there were agency regulations implementing Title VI which prohibited the expenditure of federal funds in a manner that had a discriminatory effect. 463 U.S. at 643-44.

A majority of the Court could not agree, however, on the scope of relief available in a Title VI "discriminatory effects" case. Justice White, joined by Justice Rehnquist, was of the view that "compensatory relief, or other relief based on past violations of the conditions atached to the use of federal funds, is not available as a private remedy for Title VI violations not involving intentional discrimination." 463 U.S. at 603-04.

Justice Marshall, 463 U.S. at 624-34, and Justices Stevens, Brennan, and Blackman, 463 U.S. at 636-41, disagreed, and were of the view that "nothing in Title VI or in its history

supports a restriction on a federal court's ability to remedy a statutory violation." 463 U.S. at 629 (Marshall, J.). Justice O'Connor, who held that Title VI required proof of discriminatory intent, also expressed her disagreement with Justice White's views on the limitation of remedies. 463 U.S. at 612.

Chief Justice Burger and Justice Powell did not express any view on the remedy question, concluding that the petitioners in *Guardians* could not maintain a private right of action and had not made a showing of intentional discrimination. 463 U.S. at 610-11.

This case provides the Court with an appropriate vehicle to clarify the contours of the private right of action under Title VI and to resolve the uncertainty after *Guardians* of whether proof of intentional discrimination is required in a Title VI claim brought by the intended beneficiaries of a promise to the federal government by the recipient of federal funds.

2. Prior to the decision of the Seventh Circuit in this case no federal court had held that there is a right to a jury trial in a private action arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. As the Fifth Circuit noted in *Doe* v. *Region 13 Mental Health Com'n*, 704 F.2d 1402, 1407 n. 5 (5th Cir. 1983), the remedies available under Title VI "are essentially equitable in nature, and the 'procedures' available do not include juries."

The Seventh Circuit held in this case that petitioners' Title VI had properly been submitted to a jury. (App. 5a.) The Court of Appeals appeared to conclude that money damages are available in a private Title VI case proceeding on a theory of intentional discrimination. (Id.)

The decision of the Seventh Circuit to permit a jury trial (and money damages) in a private Title VI case is a radical departure from the accepted and ordinary rule that "it is not appropriate to award money damages for Title VI violations." *Guardians* v. *Civil Service Commission*, 463 U.S. 583, 602 n.23 (1983) and warrants review by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

June, 1986

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2195

WILLIE WARREN CRAFT and LOUIS A. DESALLE III,

Plaintiffs-Appellants,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, TRUMAN O. ANDERSON, HOWARD M. BERS, ELIZABETH MCGREW, and JACK BULMASH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 3521—Nicholas J. Bua, *Judge.*

SUBMITTED JANUARY 15, 1986*—DECIDED MARCH 28, 1986—
OPINION JUNE 12, 1986**

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any Party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Defendants-appellees have filed a motion to dispense with oral argument and affirm the judgment below based on the briefs and record. Upon consideration, we grant this motion.

** This case was previously decided by unpublished order according to Circuit Rule 35. The defendants-appellees moved for publication of the order as an opinion. The motion is hereby granted.

No. 84-2195

Before CUMMINGS, *Chief Judge*, and WOOD and RIPPLE, *Circuit Judges*.

PER CURIAM. Plaintiffs Willie Warren Craft and Louis A. DeSalle III appeal the district court's denial of their post-trial motion for declaratory and injunctive relief or, in the alternative, for a new trial on the question of damages. Judgment was entered after a jury trial on plaintiffs' claims arising *inter alia* under 42 U.S.C. §§ 1981, 1983, 1985 and 2000d. We affirm for the reasons discussed below.

I

Both plaintiffs enrolled in the Medical Opportunity Program (MOP) at the University of Illinois College of Medicine (University) in 1972. Under the MOP, the College admitted students who would not otherwise have been accepted based on their undergraduate grade point averages and Medical College Admission Test scores. The MOP afforded participants various special services during the first-year course including a full-time coordinator, a special study room, faculty and upperclass student advisers, remedial learning sessions, and counseling and tutorial programs. This program, funded principally by the University, also received partial funding from a four-year grant from the Department of Health, Education and Welfare (HEW) in 1971.

After both plaintiffs failed the school's "Senior Comprehensive Examination" several times, they were dismissed from the University in 1978. Claiming that the school had not helped them prepare for the test and had not provided them with special support, the plaintiffs brought suit in August 1979 against the University's Board of Trustees, fourteen faculty members and officials, the Director of the Illinois Department of Registration and Education, the Secretary of HEW, and the United States Commissioner of Education. They alleged that the defendants had violated their rights under 31 U.S.C. § 1242 and 42 U.S.C. §§ 1983, 1985, and 2000d.

The plaintiffs' case finally came to trial in April 1984 after various amendments and dismissals.[1] At the close of the evidence, plaintiffs asked that their claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, be submitted to the jury. After considerable discussion, the court agreed. After submission, the jury interrupted its deliberations to ask if negligence was sufficient to find a violation under Title VI. The district court instructed the jury that, to award compensatory relief, they must find intentional discrimination. The jury subsequently returned a verdict against the plaintiffs on all counts.

In their post-trial motion, the plaintiffs requested that the court enter declaratory and injunctive relief or grant a new trial. The motion was denied without opinion, and this appeal followed.

II

Plaintiffs raise two issues in their appeal: First, did the district court properly instruct the jury that proof of discriminatory intent is an essential element of a Title VI claim. Second, should the district court have entered separate findings of fact and conclusions of law with regard to plaintiffs' claim for equitable relief.

The plaintiffs contend that the district court appeared to apply an erroneous legal standard to their Title VI claims. They argued at trial that the school's failure to implement remedial programs did not provide them with an "organized standard program of assistance and remediation." This alleged deficiency, they assert, violated Title VI. The district court, in its instructions to the jury, indicated that, to recover any compensatory relief, the plaintiffs were required to show that a discriminatory purpose resulted in the school's failure to comply with Title VI. The plaintiffs now argue that this was legal error, and

[1] *See Craft v. Board of Trustees*, 516 F. Supp. 1312 (N.D. Ill. 1981) (motion to dismiss by defendant).

they invite our attention to the Supreme Court decision in *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). In *Guardians*, five justices joined in holding that Title VI reached non-intentional discrimination because the agency regulations implementing Title VI prohibited the expenditure of federal funds in a manner that had a discriminatory impact. This interpretation was sanctioned by the Court in its recent decision in *Alexander v. Choate*, ____ U.S. ____, 105 S. Ct. 712 (1985). However, the two opinions read together make clear that only limited prospective relief is available under a theory of disparate impact. As *Alexander* makes clear, "Title VI *itself* directly reached only instances of intentional discrimination." 105 S. Ct. at 717 (emphasis supplied). We have consistently required "proof of intentional discrimination . . . as a basis for compensatory relief" in Title VI claims. *Timms v. Metropolitan School District*, 722 F.2d 1310, 1318 n.4 (7th Cir. 1983) (citing *Guardians*, 463 U.S. at 607 n.27). In light of the Court's opinion in *Alexander*, we see no reason to disturb our earlier holdings, for the current position of the Court is that the granting of compensatory relief under section 2000d requires proof of discriminatory intent. Accordingly, we find that the district judge's instruction to the jury was correct.

Plaintiffs also contend that the district judge was required to enter separate findings of fact pursuant to Fed. R. Civ. P. 52(a) with respect to their equitable claims. We disagree. In their post-trial motion, plaintiffs made only two passing references to a disparate impact theory. One was subsumed in a discussion of the plaintiffs' intentional discrimination theory, R. 201 at 2 ¶ 2, and the other related to the plaintiffs' dissatisfaction with the jury instruction given by the judge on the Title VI claim.

We believe that no separate findings of fact were warranted in this case. The disparate impact theory was not fairly presented to the judge as a basis for awarding equiable relief. It is well-settled that the plaintiffs "cannot present to this court . . . as a ground for reversal an issue which was not presented to the trial court." *Stern v.*

No. 84-2195

United States Gypsum, Inc., 547 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 434 U.S. 975 (1975) (citation omitted). The original and amended complaints contained allegations of intentional discrimination only. At the instruction hearing, plaintiffs' counsel asked the judge if he would amend the pleadings to conform to the evidence by adding a Title VI claim against these defendants. Tr. at 1584. Leave was granted, and the judge permitted an instruction to go to the jury on intentional discrimination within the meaning of 42 U.S.C. § 2000d. At no point in this discussion were the regulations, which according to *Guardians* and *Alexander*, *supra*, are the only avenue by which a party may state a claim based on a disparate impact theory, mentioned to the court. The regulations, 45 C.F.R. § 80 *et seq.*, are not mentioned in the post-trial motion. The complaint was never formally amended to include even the Title VI intentional discrimination claim much less to state a claim based on disparate impact. Moreover, plaintiffs declined to file a brief in support of their post-trial motion for equitable relief even though such a brief would have alerted the court as to the nature of their claim. *See* Tr. at 1845. They did not request oral argument on the motions.

This case proceeded from start to finish on a theory of intentional discrimination. We are not prepared to hold that the district judge had adequate notice that the plaintiffs sought to recover equitable relief based on regulations never mentioned before the district court. As this court has stated in a different context, "[t]he district judge was not obliged to remedy the deficiencies of the [plaintiffs'] trial preparation." *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 970 (7th Cir. 1983).

The only theory fairly presented to the court was intentional discrimination. That issue was decided by the jury. It is well-settled that the "court may not make findings 'contrary to or inconsistent with the jury's resolution . . . of that same issue as implicitly reflected in its general verdict . . . on the damages claim.' " *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 844 (7th

Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (citation omitted).[2] Accordingly, we find that no separate findings of fact were required to be entered.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[2] In any event, it is clear that he would not have done so. After the jury's verdict, the trial judge remarked:

> I must say this, Mr. Craft and Mr. DeSalle, you had probably one of the best representations I have ever seen here in Federal Court. I know you have had other lawyers who were not too anxious to try this case for obvious reasons. I can tell you that had this case been tried to the bench, my judgment would have been the same as the jury's and, apparently, your other lawyers had that feeling.

Tr. at 1843. At the end of the proceedings the trial judge stated, "[w]ell, as I indicated before the jury, it was a well tried case. But I don't think Clarence Darrow resurrected could have gotten any relief in this case." Tr. at 1848.

JUDGMENT — WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 28, 1986.

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

WILLIE WARREN CRAFT and LOUIS A. DeSALLE III,
Plaintiffs-Appellants,

No. 84-2195 vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-C-3521
Nicholas J. Bua, Judge.

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

Supreme Court, U.S.
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THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, TRUMAN O. ANDERSON, HOWARD BERS, ELIZABETH McGREW and JACK BULMASH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED *

1. Whether petitioners, having received an adverse jury verdict on their claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, may now challenge their entitlement to a jury trial on those claims, when: (a) those claims were submitted to the jury at petitioners' insistence and over respondents' objection; and (b) petitioners did not seek reversal in the court of appeals based on this alleged error.

2. Whether the court of appeals properly held that a violation of Section 2000d itself requires proof of intentional discrimination, and, whether, in any event, petitioners may complain of a jury instruction to that effect when the very instruction they now challenge was tendered by petitioners themselves.

* Petitioners are two individuals. Respondent the Board of Trustees of the University of Illinois is a body corporate and politic organized by the State of Illinois to manage the affairs of the University of Illinois. *See Ill. Rev. Stat.*, ch. 144, § 22 (1985). The additional respondents are individuals employed by the Board of Trustees as faculty members or administrators of the University's College of Medicine.

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No. 85-2149

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THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, TRUMAN O. ANDERSON, HOWARD BERS, ELIZABETH McGREW and JACK BULMASH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 793 F.2d 140.

STATEMENT OF THE CASE

1. District Court Proceedings

Petitioners are two black men who were dismissed for academic reasons from the Doctor of Medicine degree program at the University of Illinois College of Medicine after repeated failures on the Senior Comprehensive Examination; successful completion of this examination (which is scored by computer) has been required of every M.D. degree student at the College of Medicine since the adoption of the examination in 1963 (Tr. 1072). The trial evidence showed that Mr. Craft failed the examination four times; that Mr. DeSalle failed the examination five times; and that no student ever had been given more chances than Mr. DeSalle to pass the exam (Tr. 796, 906-07, 1043-44, 1323). The trial evidence also showed that, in addition to being given numerous additional chances to take this and other examinations, petitioners were afforded extensive remedial learning opportunities throughout the periods of their enrollment, but that they frequently spurned the help that was made available to them (D. Br. 20-26 (C.A. 7)).[1] Finally, the trial evidence showed

[1] For example, during Mr. DeSalle's first year, Dean Kernis attempted to assist him after he had experienced several academic failures, but Mr. DeSalle took the position that those academic failures were "not a problem" (Tr. 695-97). Similarly, after Mr. DeSalle had failed National Boards, Part I for the first time, the College of Medicine Promotions Committee recommended that he postpone his clinical work, take an additional year of study, and receive counselling on study habits and test-taking skills (Tr. 708-09). Mr. DeSalle rejected that recommendation out-of-hand, choosing instead to take and fail National Boards, Part I for the second time (Tr. 442-47, 704-709). In preparing for his fifth attempt on the Senior Comprehensive Examination, Mr. DeSalle refused

(Footnote continued on following page)

that between 1969 and 1981, the University of Illinois graduated more black medical doctors than any other medical college in the United States, with the exception of Howard University and Meharry Medical College, two historically black institutions (Tr. 1129; DX 159).

Petitioners sued the Board of Trustees and certain individual faculty members and administrators, seeking either the immediate conferral of M.D. degrees or readmission to the College of Medicine, as well as money damages in the amount of $10.3 million. In their amended complaint, which was tried to a racially-mixed jury for 13 trial days in April and May 1984, petitioners alleged violations of 42 U.S.C. §§ 1981, 1983, 1985(3) and 2000e, 31 U.S.C. §§ 6716 and 6721, common law contract duties, and the

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[1] *continued*
the University's offer to provide him with a faculty advisor or tutor, and even refused to comply with the University's request that he prepare a written study plan for faculty comment and assistance (Tr. 1493, 1503).

Mr. Craft's record is much the same. For example, after Mr. Craft failed the Senior Comprehensive Examination for the second time, he refused Dr. McGrew's offer to assist him in preparing for his third attempt (Tr. 1474, 1493). Similarly, after he failed the Senior Comprehensive Examination for the third time, a remedial program was specifically designed for him, but he refused to follow it and refused to meet with Dr. Bulmash, his advisor, who found him "resistant" to his efforts at helping him (Tr. 935, 1243, 1294).

For petitioners to contend now (Pet. 3) that the University refused to provide them with a remedial program is both disingenuous and flatly contrary to the trial evidence, which demonstrated the University's herculean efforts to provide remedial assistance to petitioners, who simply did not wish to take advantage of it. Petitioners' out-of-context quotation (Pet. 4) of a remark made by defense counsel during closing arguments cannot alter that fact. As the context shows (Tr. 1751), counsel merely stated that there were some black students (including an honors graduate called as a witness by petitioners) who did succeed in medical school without remedial assistance.

equal protection and due process clauses of the Fourteenth Amendment.

After the close of the evidence, the trial court, over respondents' objections, granted petitioners' motion for leave to amend their complaint again, this time to allege a violation of 42 U.S.C. § 2000d (Tr. 1584-86). During the instructions conference, petitioners also requested that their new Section 2000d claims be submitted to the jury (Tr. 1700-01). Petitioners specifically argued (1) that Section 2000d authorizes the granting of both damages and equitable relief, and (2) that the jury should be permitted to decide their entitlement to both forms of relief (Tr. 1584-85, 1632-36, 1700-01). For their part, respondents consistently opposed petitioners' request that their Section 2000d claims be submitted to the jury (Tr. 1584-85, 1700). Respondents argued that only equitable relief is available under Section 2000d, and that the awarding of equitable relief is a matter for the trial judge, not the jury (*id.*). At petitioners' urging, however, the trial judge eventually agreed to instruct the jury that defendants could be liable for damages under Section 2000d (Tr. 1639). The trial judge also stated that he would be guided by the jury verdict, and would award equitable relief to petitioners if the jury found in their favor on the Section 2000d claims (Tr. 1701).

With respect to petitioners' Section 2000d "damages" claims, the trial judge gave verbatim the instruction which petitioners had drafted and tendered to the court (Tr. 1798-99). The instruction provided that petitioners must show "knowing or intentional discrimination" to establish a violation of Section 2000d (*id.*).

Petitioners never moved for leave to amend their complaint to allege a violation of any administrative regula-

tion promulgated under Section 2000d. Nor did petitioners tender any jury instruction concerning an alleged violation of any such regulation. Indeed, at no time during any of the proceedings in the trial court did petitioners even mention any such regulation.

The jury subsequently returned a verdict against both petitioners and in favor of all respondents on every claim (Tr. 1837-39). When the trial judge entered judgment on the jury's verdict, he specifically stated that he would have reached the same result if he had sat as the trier of fact (Tr. 1843). Petitioners subsequently presented a post-trial motion for declaratory and injunctive relief and for a new trial. Petitioners did not request oral argument on the motion, declined the court's invitation to file a supporting memorandum, and filed no reply to respondents' answer. The trial judge denied petitioners' post-trial motion on June 28, 1984. In denying the post-trial motion, the trial judge stated that petitioners' case was so weak that "Clarence Darrow resurrected could [not] have gotten any relief in this case" (Pet. App. 6a n.2).

2. Seventh Circuit Proceedings

On appeal, petitioners argued that the judgment should be reversed for two reasons. First, petitioners argued that the trial judge should not have given the jury the Section 2000d instruction which they themselves had tendered because petitioners' instruction stated that proof of discriminatory intent was an element of their Section 2000d claims. Second, petitioners argued that the trial judge erred in failing to enter separate findings of fact and conclusions of law with respect to their claim for equitable relief, despite the fact that they never asked him to do so, and, further, despite the fact that the jury had determined that respondents had not violated Section 2000d.

The court of appeals affirmed. First, the court of appeals held (Pet. App. 4a) that the Section 2000d instruction given to the jury was a correct statement of the law, because, as this Court reaffirmed in its unanimous decision in *Alexander v. Choate*, 105 S. Ct. 712, 717 (1985), Section 2000d itself "reache[s] only instances of intentional discrimination."[2] Second, without intimating any opinion as to whether the district court should have acceded to petitioners' request that their Section 2000d claims be submitted to the jury (that issue not having been raised on appeal), the court of appeals held that the trial judge, having submitted the Section 2000d claims to the jury, was bound by the jury's finding that respondents had not violated Section 2000d (Pet. App. 5a).

[2] The court of appeals recognized (Pet. App. 4a-5a) that a party properly may seek limited and prospective equitable relief, notwithstanding his failure to prove intentional discrimination, if he bases his entitlement to relief on purported violations of certain regulations promulgated under Section 2000d. As the court of appeals pointed out, however, that principle is irrelevant in this case because "[t]he disparate impact theory was not fairly presented to the [district] judge as a basis for awarding equitable relief. . . . [and the] regulations [were] never mentioned before the district court" (*id.*).

REASONS FOR DENYING THE WRIT

Petitioners ask that this Court grant review in this case for the purpose of holding that they were not entitled to the jury trial which they persuaded the trial court to grant them over respondents' objections, and for the additional purpose of holding that the Section 2000d jury instruction which was given by the trial judge at petitioners' specific request is not an accurate statement of the law. In addition, they ask that this Court clarify the scope of relief available for violations of regulations promulgated under Title VI, as well as the standards of proof applicable to cases involving such violations—despite the fact that petitioners never mentioned, let alone invoked, any such regulations at any time during the district court proceedings in this case.

Petitioners have deliberately concealed from this Court the central fact that they themselves induced the district court, over respondents' strong objections, to commit the "errors" about which they now complain. Similarly, petitioners have deliberately concealed from this Court the fact that the issues they now seek to raise were not raised below and are not supported by the record. In sum, the petition in this case is frivolous and should be denied.

I. THE SEVENTH CIRCUIT DID NOT REACH THE QUESTION WHETHER A JURY TRIAL IS AVAILABLE FOR TITLE VI VIOLATIONS AND DID NOT THEREFORE CREATE ANY CONFLICT IN THE CIRCUITS.

Petitioners assert (Pet. 7) that this case warrants review by this Court because the Seventh Circuit "held" that petitioners' Section 2000d claims properly were submitted

to the jury, a "holding" which allegedly conflicts with the Fifth Circuit's decision in *Doe v. Region 13 Mental Health Commission*, 704 F.2d 1402 (5th Cir. 1983). In fact, the Seventh Circuit's opinion contains no such holding, either at the page which petitioners cite (Pet. App. 5a) or anywhere else. The fact is that the Seventh Circuit took this case as it found it. The Section 2000d claims had been submitted to the jury because petitioners had insisted that they be submitted to the jury, and the trial judge, over respondents' strenuous objections, acceded to petitioners' request (Tr. 1585-86, 1632-39, 1700-01).

On appeal, respondents obviously had no reason to attack the jury verdict, and petitioners, having induced the error themselves, quite properly recognized then (if not now) that they had no standing to complain. Thus, the question of petitioners' entitlement to a jury trial on their Section 2000d claims simply was not presented to the Seventh Circuit. In that court, petitioners presented only two issues for review, neither of which concerned the propriety of submitting their Section 2000d claims to the jury: (1) whether proof of discriminatory intent is an essential element of a Section 2000d claim, and (2) whether the trial judge erred in failing to enter separate findings of fact with respect to petitioners' claim for equitable relief (Pet. App. 3a). In resolving these questions, the Seventh Circuit held only that the jury instruction tendered by petitioners constituted a correct statement of the law, that is, that proof of intentional discrimination is necessary to prevail on a claim under Title VI itself. *See Alexander v. Choate*, 105 S. Ct. 712, 717 (1985). In approving that legal standard, however, the Seventh Circuit neither had any occasion to discuss, nor did it in fact discuss, the ques-

tion whether that legal standard ordinarily should be applied by the judge, rather than by the jury.[3]

In sum, the Seventh Circuit did not hold that Title VI plaintiffs are entitled to a jury trial. All that the Seventh Circuit did in this case was to follow the well-established practice of deciding only those issues which the parties present to it for decision. *See, e.g., Preston v. United States*, 709 F.2d 488, 489 (7th Cir. 1983). For these reasons, petitioners' assertion of a conflict among the circuits on this point is wholly disingenuous.

II. THE SEVENTH CIRCUIT'S HOLDING THAT INTENT IS AN ELEMENT OF A SECTION 2000d CLAIM IS CORRECT AND DOES NOT CONFLICT WITH ANY PRIOR HOLDING OF THIS OR ANY OTHER COURT.

Relying on this Court's decision in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), the Seventh Circuit held (Pet. App. 4a) that discriminatory intent is an essential element of a claim for compensatory relief under Title VI itself. Petitioners do not assert that this holding conflicts in any way with any other decision of this or any other court, and, in fact, no such conflict exists. Despite the absence of any conflict, petitioners suggest (Pet. 7) that this Court should grant review in this case for the purpose of "clarifying" its opinion in *Guardians*.

Since there is no conflict on this point, the absence of any need for "clarification" is manifest. Moreover, as the Seventh Circuit recognized (Pet. App. 4a), this Court has recently explained its holding in *Guardians*. In *Alexander*

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[3] As the Seventh Circuit pointed out (Pet. App. 6a n.2), the issue would have been entirely academic in any event because the trial judge specifically stated that he would have reached the same result if he had been sitting as the trier of fact.

v. Choate, 105 S. Ct. 712, 716 (1985), this Court revisited the question "whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate impact discrimination." In *Alexander*, Justice Marshall, writing for a unanimous Court, reaffirmed the Court's holding in *Guardians*, stating: "[T]he Court [in *Guardians*] held that Title VI itself directly reache[s] only instances of intentional discrimination" (*id.* at 717). In sum, it is difficult to imagine how this Court could give any further clarity to this rule of law.[4]

Petitioners' suggestion that the Court grant review to "clarify" this issue is absurd for at least two further reasons. First, the statement of the law which petitioners now contend to be erroneous was contained in a jury instruction which they themselves prepared and tendered to the trial court (Tr. 1798-99). Thus, they have no standing to raise the issue. Second, the specific "clarification" they seek is wholly irrelevant to this case. Petitioners seek "clarification" (Pet. 6) concerning the standard of proof required to establish a violation of administrative regulations promulgated under Title VI. However, that issue is entirely irrelevant to the case at bar because peti-

[4] Petitioners make a half-hearted attempt to distinguish *Guardians* by asserting (Pet. 5) that the breach of a general condition not to discriminate, which was at issue in *Guardians*, is somehow "different" from respondents' alleged breach of a promise to provide remedial programs. In addition to founding their distinction upon a factual premise which is entirely contrary to the trial evidence (*see* pages 2-3 & note 1, *supra*), petitioners fail to explain why any legal significance should be attributed to this alleged factual difference. Finally, as with virtually all of petitioners' arguments in this Court, this argument is one that was not made in either court below.

tioners never sought any relief whatever in the district court based on any alleged violation of any such regulation (Pet. App. 5a). Indeed, no such regulation was even mentioned by petitioners during the trial. Nor was any such regulation mentioned in petitioners' post-trial motion. This issue is entirely the figment of appellate counsel's imagination. There is nothing in the record to support raising it here.

III. THE QUESTIONS WHICH PETITIONERS CLAIM TO WARRANT REVIEW BY THIS COURT ARE NOT REVIEWABLE IN ANY EVENT BECAUSE THEY CONCERN ERRORS INDUCED BY PETITIONERS OR ARE MATTERS THAT WERE NO PART OF THE TRIAL OF THIS CASE.

Nowhere is petitioners' lack of candor more obvious than in their total failure to acknowledge that the "errors" upon which they now seek review are errors which they themselves induced the district court to make. Petitioners repeatedly implored the district court to submit their Section 2000d claims to the jury, and the trial judge did so over respondents' equally repeated objections (Tr. 1585-86, 1632-36, 1700-02). In addition, petitioners themselves drafted and tendered to the trial judge the very jury instruction that they now maintain erroneously stated the law (Tr. 1798-99). Finally, petitioners never alleged any violation of any Title VI regulation at any time during the district court proceedings in this case, and petitioners never advanced a disparate impact theory at trial. As the court of appeals correctly observed (Pet. App. 4a), "[t]his case proceeded from start to finish on a theory of intentional discrimination."

The short answer to the petition in this case is that this Court does not sit to review issues manufactured by appellate counsel; nor does this Court sit to resolve disputes

between trial and appellate counsel as to how petitioners' case should have been handled in the trial court. Thus, the fundamental question presented in this case is neither of the questions presented by petitioners, but the question whether a party may seek review in this Court based on issues not presented below and on errors which the party himself induced the trial court to make. Upon that question, there is no conflict among the circuits. Petitioners' inability to seek review based on errors which they themselves induced is a matter of hornbook law, as the Seventh Circuit correctly held below (Pet. App. 4a-5a). *See, e.g., International Travelers Cheque Co. v. Bank America Corp.*, 660 F.2d 215, 224 (7th Cir. 1981) ("[a] party cannot complain of errors which it has committed, invited, induced the Court to make, or to which it has consented"). Similarly, petitioners' inability to raise issues for the first time in this Court is well-established. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). *See also Oneida County v. Oneida Indian Nation*, 105 S. Ct. 1245, 1257 (1985); *Delta Airlines v. August*, 450 U.S. 346, 362 (1980); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1976); *Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 37 (1976); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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